Supreme Court, U.S.
FILED

031233 MAR 1 2004

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

HAROLD J. WHEELER; LAWYER WHEELER, Jr.

Petitioners

v.

UNITED STATES OF AMERICA

Respondents

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Alvin O. Chambliss, Jr.
Counsel of Record
3022 South Lamar Blvd.
Oxford, MS 38655
662-234-4321

QUESTIONS PRESENTED

1. May a criminal trial be transferred from the division where the crimes occurred and where defendants reside solely for the "convenience of an electronic courtroom," thereby eliminating the common law vicinage presumption embedded in the Sixth and Fourteenth Amendment vicinage clause violate defendants rights.

2. May a Federal Court pursuant to 28 USC 1861 enhance jury participation of under-representation minorities in the Jury Selection Process when not to do so result in racial imbalance.

3. Whether the long standing practice of the United States District Court for the Northern District of Mississippi of not holding federal court in Clarksdale and Greenville, two areas heavily populated by Blacks on a regular basis and changing Divisions or otherwise closing the Delta Division proper under law.

PARTIES TO THE PROCEEDING

"Petitioners - Defendants"

Dr. Harold J. Wheeler and
Lawyer Wheeler, Jr.

"Respondent - Plaintiff"

The United States of America

The parties to the proceedings before the United States Court of Appeals for the Fifth Circuit were Petitioners Harold J. Wheeler and Lawyer Wheeler, Jr.; United States Attorney Northern District of Mississippi Jim M. Greenlee, United States Attorney, John Marshall Alexander and David A. Sanders; Assistant United States Attorneys.

Counsel for Petitioners in the 5th Circuit Court of Appeals were Thos. W. Davenport, Jr.; Carey B. Underwood, Richard Crane, Luke J. Schissell, Wayne Dowdy, Nelson Estess, Gene E. McKissie and Jesse L. Kearney.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations ..... iv-vii

Opinions Below 1

Jurisdiction 1

Statues and Regulation Involved 1

Statement of the Case 1

Statement of Facts 4

Reasons for Granting Writ of Certiorari

Given the long history of voting/jury racial exclusion in Mississippi; to what extent should Federal Courts consider the relative demographics, especially the racial demographic of the original venue and the venue to which a criminal matter is transferred? ... 7

Reason for Granting the Writ:

There Are Conflicts Within Many of the Circuits as to the Implementation of 28 U.S.C. § 1861 and the Jury Selection Process 19

Conclusion 30

TABLE OF AUTHORITIES

CASES **Page(s)**

Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) 20
Arlington Heights v. Metropolitan Housing Corp. 429 U.S. 252, 267 (1977) 20
Baston v. Kentucky, 476 U.S. 719 (1986) 15
Duren v. Missouri, 439 U.S. 357 (1979) 19
Hill v. Texas, 316 U.S. 400, 404 (1942) 21
Humphrey v. United States 896 F2d 1066 (7th Cir. 1990) 8
J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) 15, 16
Mallett v. Missouri, 494 U.S. 1009 (1990) 15, 19, 20
Norris v. Alabama, 294 U.S. 587, 591-92 (1935) 21
Peters v. Kiff, 407 U S. 493, 503-04 14
Powers v. Ohio, 499 U.S. at 409 15
Taylor v. Louisiana, 419 U.S. 522, 530, 538 (1975) 8, 14
Tech v. Alabama, 447 U.S. 625, 642 (1980) 16
Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) 15
Thompson v. Utah's 12
United States v. Fernandez, 480 F2d 726, 734 (2d Cir. 1973) 14
United States v. Johnson, 323 U.S. 273, 276 (1944) 9
United States v. Mississippi, 380 U.S. 128 (1965) 18
U.S v. Harold J & Lawyer Wheeler, CR-No.4:01CR 109 9/19/01 4
Washington v. Davis, 426 US 229, 242 (1976) 20

TABLE OF AUTHORITIES (cont.)

CASES **Page(s)**

Whitus v. Georgia, 385 U.S. 545, 552 (1967) 20
Williams v. Florida, B 399 U.S. 7887 (1970) 11
Zicarelli v. Gray, 543 F.2d 466 (3rd Cir. 1976) 15

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment 6, 10, 19
Jury Selection and Service Act
28 U.S.C. 1861 et seq 1, 8, 19
Federal Rule of Criminal Procedure R. 18 8
Magna Carta Runnymede, June 15, 1215 11

TREATIES, JOURNALS, LAW REVIEW and MISCELLANEOUS

Deuteronomy 16:20 1
1 Journals of the House of Burgesses 1766-1769 at 214 (John Pendleton Kennedy ed. 1906 10
Letter from the Virginia House of Burgesses to the King, Journals of House of Burgesses at 215-16 10
3 William Blackstone Commentaries 350-379 10
3 Elliot's Debutes on Adoption of the Federal Constitution 150 (Philadelphia, Jonathan Elliot ed. 1836 (1787) 10
1 F.Pollock & F. Maitland, The History of English Law Before the Time of Edward 1, p.173 N.3 (2nd ed. 1909) 11

TREATIES, JOURNALS, LAW REVIEW and MISCELLANEOUS (cont.)

CASES **Page(s)**

F.W. Mattland, The Constitutional History of England: A Course of Lectures Delivered 122 (1926) 11

Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development 13-34 (1951) 11, 12

W.McKenchnie, Magna Carta 134-138, 375 382 (1958) 12

1 William Holdsworth, A History of English Law 333 (A.L. Goodhart & H.G. Hambary eds. 7th ed. 1965) 11

2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 662 (Cambridge Univ. Press 1895) 11

The Book of Englis Law 77 (P.B. Fairest ed. 6th ed. 1967) 11

Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669-672 (1918) 12

Frankfurther & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922 N. 14 (1926) 11, 12

Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases 67 Tulane L. Rev. 1855, 1931-35 (1933) 7

TREATIES, JOURNALS, LAW REVIEW and MISCELLANEOUS (cont.)

CASES **Page(s)**

Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King, 106 Harv. L. Rev. 705 (1993) 7
The Public's Vincinage Right: A Constitutional Argument 75 N.Y.U. Law Rev. 1658 (Dec. 2000) 7
Outram, Change of Venue - A Constitutionall Analysis, Nat'l Bar Assoc. Magazine 26 (April - ... 1993) 7
U.S. Commission on Civil Rights (1982) 4

The Petitioners, Dr. Harold J. Wheeler and Lawyer Wheeler, Jr., respectfully pray that this Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on December 2, 2003.

OPINIONS BELOW

The October 31, 2003 Opinion of the Court of Appeals is unreported and is set out at pp. A1-A14 of the Appendix to this Petition. The decision of the United States District Court for the Northern District of Mississippi is unreported and was rendered on May 25, 2003.

JURISDICTION

The decision of the court of appeals was entered on December 2, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. Rehearing A15.

STATUTES AND REGULATIONS INVOLVED

The relevant Constitutional, Statutory and Regulations are set forth in the Appendix. A24-A40 Jury Plan Pursuant 28 U.S.C. 1861.

STATEMENT OF THE CASE

In the law of Moses Deuteronomy 16:20, it is written, "**Justice and only justice** shall you pursue." You shall not distort justice, you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the **wise** and perverts the words of the righteous."

This case is about two hardworking, honest, delta farmers, Harold J. Wheeler and Lawyer Wheeler, Jr., who experienced actual farm losses of over $800,000 due to a

natural crop disaster in 1998. They are the first farmers in the State of Mississippi to be convicted of allegedly, "knowingly and willingly making a materially false statement to the United States Department of Agriculture – the Farm Service Agency" ("FSA"). Petitioner are not aware of indictment for (falsifying planting dates), because normally the local FSA attempts to obtain the correct information or verify the accuracy of the information through the process of the local FSA county committee. The FSA county committee system was completely by-passed by the Mississippi State FSA personnel. Petitioners were not given 'due process' commonly afforded to other farmers. According to a newsletter, the deadline for an application to be submitted was April 9, 1999. There were no exceptions or exemption for a late-filed application. 87 C.F.R. part 1477, p.3. The Leflore County FSA technician Brenda Ricks summoned the defendant Harold J. Wheeler back to the Greenwood FSA office, 33 days later, on or about May 12, 1999. She had already filled out and transferred all the previously recorded information, from one set of forms to another new set of forms dated May 12, 1999. The May 12, 1999 CCC-540 were not attached or amended to the previous April 5, 1999 CCC-540. [A memo sent by CEO, Robert Givens of Leflore May 5, 1999 entitled Suspected Case of Abuse (MS Notice DAP-23 Paragraph 7]. According to DAP-23 no further action was to be taken in regards to the disaster application. On May 12, 1999 the defendant Harold J. Wheeler arrived in the Leflore county FSA and merely affixed his signature to the form.[1]

---

[1] The Leflore and Sunflower Counties 540 Disaster Application of Petitioners were null and void ab initio. Federal Legislation and regulations require FSA County Committee action before an application is legal. After the trial and conviction of Petitioners, General Counsel of USDA advised that the convictions were void or voidable because no action taken by the county committees. Petitioners attempted to withdraw the 540 application in Leflore and Sunflower Counties in early August, 2002 but were not allowed to do so instanter. On August 29,

The reasons why these 2 black farmers were not treated fairly is racial. Petitioner Harold J. Wheeler became Chairman of the Mississippi FSA and was declined by some. Prior to being appointed he protested against the local FSA agency being all-white. A-167. Petitioner was a participant at the Dan Glickman, Secretary of Agriculture Civil Rights hearing in Belzoni Mississippi, January, 1997. Petitioner encountered previous difficulties with FSA in 1988 and was thrown out of the U.S.D.A farm programs for "swampbuster" violations. This ouster was summarily reversed by the Soil Conservation Service Official from Washington, DC in his 1989 Audit, Inspection and Investigation. In 1990 the entire Wheeler family was investigated by USDA – OIG. In 1993 Wheeler Farms were again disqualified from USDA participation and were ordered to refund with interests, all USDA payments of $367,000. The National Appeals office overturned the State decision. In 1995, Petitioners Father, Lawyer Wheeler, Sr. was convicted of bankruptcy fraud. The white attorney who controlled this legal procedure was not prosecuted, although he was later disbarred, he did not spend time in jail. The Judge presiding was Judge Neal Biggers, and the prosecuting attorney John Alexander and Chad Lamar. Judge Biggers dismissed Dr. Wheeler testimony in the presence of the jury and made disparaging statement unbecoming a Judicial Official.[2]

2002 and September 3, 2002 the Leflore and Sunflower Counties FSA Committees met on the applications and refused to declare petitioners ineligible because of non-irrigation of double-cropped cotton behind wheat but ruled that the applications were denied because of fraud. Again, if the FSA committee in each county had met initially and declared the applicants ineligible because of non-irrigation, this case would not be!

[2] During the trail while Shirley Ford a USDA Crop .. adjuster was testifying before the jury, Judge Biggers made the statement "Don't you know that the defendant family has been involved in defrauding the government referring to petitioner's father trial which he presided over

STATEMENT OF FACTS

Petitioners Harold J. Wheeler and Lawyer Wheeler, Jr., are Black farmers in Mississippi.[3] The family history of farming in Mississippi is over 100 years old.[4] The District Court at the sentencing hearing stated:

> "This case is one of the more tragic cases I have seen in my twenty-five plus years on the bench. We have got men who are up before the Court having been convicted of felonies. They are hard workers, intelligent, industrious have a very commendable work ethic. They help other people and many people who they have helped have written letters to the Court asking for leniency". *USA v. Harold & Lawyer Wheeler* Sentencing Hearing 4:1CR109-B-B 9/10/02.

---

earlier. The exchange between the Judge and witness is mysteriously absent from the trial transcript

[3] *U.S. v. Harold J. & Lawyer Wheeler* CR-No.4:01CR109 9/19/01. The plight of black farmers in America is best summarized by the 1982 Commission on Civil Rights report. "The Decline of Black Farming in America." This report documented the unparalleled rate of loss of black-owned and operated farms in this country (a rate of loss 2 ½ times that for white-operated farms over the last decade). Only 47,271 Black-operated farms remained in 1978, compared to the approximately 926,000 farms operated by Blacks in 1920. In 1982, the U.S. Commission on Civil Rights asserted that the "Social and economic costs of displacement of black farm families.... are likely to be greater than the cost of assisting these families to be productive and self-sufficient on their own land. The report mentioned the role of USDA in providing assistance to Black farmers, and found that USDA may not be enforcing civil rights laws effectively to ensure that minorities receive equal opportunity.

[4] His father Lawyer Wheeler, Sr. left Mississippi at 16 to work in the steel mills of Gary Indiana. After coming back to Mississippi to enlist in the US Army to serve in the Korean Conflict from 1951-53 in the 73rd Engineering Battalion. After his discharge he started farming in Bobo, Mississippi where he supplemented his income brick laying, a trade he obtained through night classes in Junior College.

On September 19, 2001, an indictment was returned against Harold J. Wheeler and Lawyer Wheeler, Jr.. The indictment alleged the Wheelers knowingly and willfully made materially false statements concerning the planting dates of their 1998 cotton crop in acreage reporting forms used in the Federal Crop Insurance Program and in applications under the Federal Disaster Assistance Program in Leflore, Carroll, and Sunflower Counties in the State of Mississippi. The alleged crimes occurred in the Greenville Division of the Northern District of Mississippi, the same division where the Wheelers reside. On October 10, 2001, the Wheelers were arraigned and pled not guilty in the Greenville Division and were each released on a $10,000.00 unsecured appearance bond. Petitioners case was assigned to District Judge Neal B. Biggers, Jr., who they were told never held court outside of Oxford, Mississippi. A4-A8. At the arraignment reasons were sought as to why the case was assigned to Oxford. The trial was set for jury trial in Oxford, Mississippi on November 13, 2001 and later postponed until May 20, 2002 in Oxford, Mississippi. Although the opposition to the Oxford trial begin early, the Court did not hold a hearing on the issue. A6.

Prior to trial, the Wheelers filed an objection to having the trial in the Western Division and a motion to move the trial to the Greenville Division of the Court for the convenience of the Petitioners, their witnesses and in the interest of justice. Petitioners stressed that farmers made up 60% of the Greenville Division and/or farm related activities. A-23 Moreover, the Mississippi Delta Council District is almost identical with the Delta Division and the Greenville Division of the Federal Court. The denial of trial in the vicinage under the circumstances, is a denial of substantial justice.

The raw Black population of the Greenville Division was 63.5% as opposed to the very small percentage of farmers in the Oxford-Western Division. The Black

population in the Oxford-Western Division is 36.5%.

On April 2, 2002, the district judge denied the motion for change of trial venue citing the "electronically equipped courtroom in Oxford' as one of the determining factors for his decision. The court also ordered a district-wide venire to convene rather than a division-wide venire from the Greenville Division. The Wheelers filed a Motion to Reconsider the court's Order on May 1, 2002, stressing the inconvenience of the Defendants and their witnesses and the desire for a trial by a jury of their peers under the Sixth Amendment and the Fourteenth Amendment. The court again denied the Motion on May 9, 2002, finding the convenience of the electronic courtroom and the district-wide jury selection process as ordered would afford the Defendants a fair trial. At no time did the Court mention the convenience of the defendants, their witnesses and the people in the vicinage. A7-A8.

Shortly prior to trial, the Wheelers filed a Motion to Quash the jury venire re-urging the foregoing grounds. Additionally, the Wheelers showed the combined population of the Northern District of the court is 43.1% black (as opposed to 63.5% black in Greenville). Also, only one-third of the population in the district are farmers or farm related people. To the contrary, the Greenville Division is comprised of persons of whom 60% are farmers and farm related. The jury questionnaires received by the Wheelers identified 83 persons from the Northern District of Mississippi, only 18.9% of whom were black, One out of the 83 total was a catfish farmer. [Catfish farmers do not participate in any USDA farm programs] 78% of whom were white (65). The male/female breakdown were 37 W/F; 28 W/M; 13 B/F; 5 B/M strangely, no Black males out of the Oxford-Western Division were selected. The veniremen actually summoned to appear for the case were disproportionately white and disproportionately non-farmer. The Wheelers requested postponement of the trial to allow

them an opportunity to discover and present proof in support of the Motion. The court denied the Motion, finding the jurors were selected at random by computer from voter registration of each county and no human judgment entered into the equation. (Transcript, p.13). The history of voter registration discrimination and Black voting problems in Mississippi were not addressed. A Motion to Quash the jury venire was denied by the Court. A1-A4. A Motion to Challenge the venire prior to trial was postponed and later a limited challenge was allowed and denied.

REASONS FOR GRANDING WRIT OF CERTIORARI

This case presents an issue of national currency that promises to remain near the forefront of those begging definitive resolution. Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases* 67 Tulane L. Rev. 1855, 1931-35 (1993); Note, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King*, 106 Harv. L.Rev. 705 (1993); Outram, *Change of Venue - A Constitutional Analysis*, Nat'l Bar Assoc. Magazine 26 (April - ... 1993); The Public's Vincinage Right: A Constitutional Argument. 75 N.Y.U. Law Rev. 1658 (Dec. 2000).

Given the long history of voting/jury racial exclusion in Mississippi; to what extent should our courts consider the relative demographics, especially the racial demographics of the original venue and the venue to which a criminal matter is transferred?

i.
TRIALS IN THE VICINAGE

The long held practice of criminal defendants being tried by a jury drawn from the geographical area where the crime occurred continue to elude Black Mississippians in the

Delta area. While Federal Rule of Criminal Procedure R. 18 makes clear that "Vicinage" is not coterminous with boundaries of the division, the notion of the Sixth and Fourteenth Amendment guaranty cannot be dismissed lightly. Many times a transfer or holding a trial outside the immediate area where the crime occurred effectively excludes from the trial all jurors residing in the area where the crimes were committed. Thus, Vicinage for purposes of Federal Courts should mean the judicial division and a jury should be drawn in such a manner that persons from the neighborhood may participate and/or are not unreasonably excluded because of race, occupation or location.

Rule 18 of the Federal Rules of Criminal Procedure specifies only that "the prosecution shall be had in a district in which the offense was committed." In *Humphrey v United States, 896 F2.2d 1066* (7th Cir 1990). While Petitioners are not entitled to a particular racial composition, given Mississippi's stormy history of jury/voting exclusion, excluded juror who are Black should have recourse if this court examine the totality of the circumstances. Thus, *Taylor v. Louisiana* 419 U.S. 522, 538 (1975) to the extent it allows Black defendants criminal cases to be transferred to counties with virtually no Blacks need to be revisited.

Transferring a case so as to reduce the likelihood that representation of a defendant's race are diminished on the venire should cause concern. The practice in the Delta as applied violates 28 U.S.C. §§ 1861-1878 et seq. Judge Biggers refused to allow a trial-type like hearing on the venue and cross-section representation issue prior to trial and during the first few days. After repeatedly urgings by Petitioner's Counsel, the Court allowed one clerical staff of the Court to testify.

Mary Ann Rambo, a white jury administrator was uncertain about all of the procedures.

"Testimony by Ms. Rambo about how the jurors are summoned. Twelve thousand from each of three districts are

put into a jury wheel. She receives these names from each of the circuit courts. This is all done by computer. She then sends questionnaires to a designated number. If they call in with hardships such as stay at home moms with young children they will be excused prior to appearing in court. The clerks have authority to excuse the jurors for hardship." A16-A23.

No cross-examination was allowed nor did the court allow petitioners to complete the inquiry. Ms. Rambo did say that names were obtained from the Mississippi Circuit Clerks Office of Registered Voters. 12,000 names are selected by the Clerk in each District. If the questionnaires were answered, there was follow-up but nothing happened to the questionnaire not answered. Total reliance is given to the Circuit Clerks within the division.

JURORS DRAWN AT-LARGE DISTRICT-WIDE IS DILUTIVE OF DIVISION REPRESENTATION?

The Constitution guarantees criminal defendants the right to be tried by a jury that is both impartial and drawn from the vicinity of the crime.[5] The place of a criminal trial is not a matter of accident or administrative convenience.[6] The transfer of criminal trials is and continue to be problematic on both policy and constitutional grounds as has been in the eyes of the framers.[7] The first congress framed

---

[5] The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. Amend. VI.

[6] See *United States v. Johnson*, 323 U.S. 273, 276 (1944) (Frankfurter, J.) ("Questions of venue in criminal cases.... Are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.").

[7] The vicinage presumption is an essential part of the right to trial by jury. In the struggle for independence, the colonist stood ready to defend

the Sixth Amendment with the understanding that the traditional vicinage presumption protected the structural interests of the jury system, as well as the rights of the defendants. While the vicinage right remains an important security to defendants, its objective is not to guarantee defendants the most favorable jury available.[8] The Sixth Amendment instead prohibits the government from selecting a distant jury that would be less familiar with the context of the crime than a jury of the vicinage and so more likely to convict the innocent. It likewise ensures that the accused will not be forced to defend himself in a distant forum that will make it more difficult to summon witnesses to speak on his behalf.[9] Here 61 witness simply were unserved!

The first juries were administrative bodies summoned by royal officials to provide information about their locality.

---

the inestimable privilege of being tried by a jury from the vicinage. Virginia Resolves (May 16, 1769), reprinted in Journals of the House of Burgesses, 1766-1769 at 214. (John Pendleton Kennedy ed., 1906).

[8] The American Founders followed Blackstone in recognizing the vicinage right as an important safeguard to the defendant against unjust persecution. Blackstone recognized that the vicinage requirement was a great protection to the innocent defendant, as he could not "be affected either in his property, his liberty, or his persons, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, supra note 81, at *379. Compare Blackstone's account with that of the Continental Congress's description of the jury right: "This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage.... Shall pass their sentence upon oath against him. Address to the Inhabitants of Quebec (Oct. 26, 1774), reprinted in 1 Journals of Continental Congress, supra note 142, at 107.

[9] See, e.g., Letter from the Virginia House of Burgesses to the King, in Journals of the House of Burgesses, supra note 120, at 215-16 (describing plight of American transported to England for trial, to be tried by "Strangers" to his country in place "where no Witness can be found to testify his Innocence"); 3 Elliot's Debates, supra note 156, at 447 (remarks of Mr. Henry of Virginia) (expressing concern that government might carry accused "from one extremity of the state to another").

The jurors represented the community in its dealings with royal officials, an it was their familiarity with local affairs that first led them to take on a judicial role.[10] Jurors were impartial in the sense that they could not be related to either of the parties or have a financial interest in the trial, yet the law welcomed their extra-judicial knowledge of the facts of the case. If they were not familiar with the events, they were expected to investigate matters themselves prior to the trial.[11] In the early days of the common law, the court relied more upon the jurors' commitment to their solemn oaths than it did upon the evidence represented at the trial. Indeed, it was only in the seventeenth century that English law recognized defendants' right to present evidence in their defense.[12]

As this court said in *Williams v. Florida*, 399 US 78, 87 (1970) "That history revealed a long tradition attaching importance to the concept of relying on a body of great ones peers to determine guilt or innocence as a safe guard against arbitrary law enforcement." In *Williams* this court said "this announcement was supported simply referring to the "Magna Carta" and by quoting passages from treaties ...[13] The

---

[10] See 1-William Holdsworth, A History of English Law 333 (A.L. Goodhart & H.G. Hambury eds., 7th ed. 1956) (describing how Florentine merchants were summoned to serve as jurors in case involving act that allegedly took place in Florence); F.W. Maitland. The Constitutional History of England: A Course of Lectures Delivered 122 (1926) (stating that "the germ of trial by jury" was for English judges to summon neighbors from area of crime).

[11] See 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 622 (Cambridge Univ. Press 1895). The jurors generally were selected two weeks before the trial to give them time to speak with witnesses. See id.; see also Edward Jenks, The Book of English Law 77 (P.B. Fairest ed., 6th ed. 1967).

[12] Until this right became established, indictment by the grand jury was practically conclusive of guilt. See Heller, supra note 24, at 9 (describing late adoption of defendant's right to call witnesses).

[13] Whether or not Magna Carta's reference to a judgment by one's peers was a reference to a "jury" – a fact that historians now dispute, see, e.g., 1 F.Pollock & F. Maitland, The History of English Law Before the Time of Edward I, p. 173 n. 3 (2d ed. 1909); Frankfurther & Corcoran, Petty

important footnote 27 is cited in its entirety to show that the argument of vicinage and jury trials at least go back to the "Great Charter".

The flaw in the Jury Plan as testified by Ms. Rambo is the unique form of unconscious discrimination. The unknowledged whiteness of facially neutral criteria for the jury plan i.e. [1/3 from each division] demands the adopting of strategies that counteract the influence of unrecognized white norms in the jury selection process. While Ms. Rambo testified that race is used to answer inquiries, it is not used to enhance the diversity within the pool.

Mary Ann Rambo Jury Administrator

Q Do you happen to know or have any idea what proportion your jury represents to the total population in the district?

A No, sir, I have no idea. Our automation people could maybe pull that up. I have no idea.

Q Do you know or have information that tells you the racial makeup of the district?

A I do not have that. It is not anything that we deal with daily, but upon request our automation people could find that in the wheel, the makeup.A16-A23.

Q Okay. Is it fair to say that you sent us 81 questionnaires?

Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922 n. 14 (1926) (criticizing *Thompson v. Utah's* reliance on the document "long after scholars had exposed this ancient error") – it seems clear that the Great Charter is not authority for fixing the number of the jury at 12. See W. McKechnie, Magna Carta 134-138, 375-382 (1958); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 672 (1918).

As the text indicates, the question is not whether the 12-man jury is traced to 1215 or to 1789, but whether that particular feature must be accepted as a *sine qua non* of the jury trial guaranteed by the Constitution. See Heller, *supra*, n. 25, at 64.

A It is fair to say.
Q Okay.
A I have no idea how many is here, but I can count them if you wish. A16-A23.
Q Did you, prior to sending that out, or have you since then, compared the numbers of African Americans as opposed to those who are white?
A I notice that you started out with 23 and then I noticed when my list, I think it was Friday, that you had 15 still down to come. A16-A23.
Q Okay. Would it be fair for me to state that at the time that you sent those questionnaires and the cards out to count, that there was 18 African Americans among the list and the remainder's white?
A (Nods head up and down.)
Q Yes
Q Would you have any problem if my calculations indicate that that would be roughly 22 percent of the total? That if 18 of 81 is roughly 22 percent of the total that were black? A16-A23
A I do not deal with – I don't ay attention to that so I really don't know what to say to you about this. This is not anything that I keep tabs on or that I look at.
Q Okay. You indicated that you sent us a questionnaire and you also sent us a card; is that correct?
A That's correct.
Q Does the card identify that prospective jurors by color?
A It does.
Q Do you prepare that card?
A That card is prepared by the – it's the computer. It comes out of our jury wheel.
Q Okay.
A All of this is. The information sheets that the jurors return to us giving us updated information on them.
Q Okay. So the – are you saying that the computer has

that information and makes that – identifies – A16-A23

Q Is there a reason that relates to the function of selecting the jury why you would program the computer to identify persons by race?

A So that we would have that information upon request.

Q Okay.

A But it's in the computer program and our automation person is not here to prove that.

Q Okay. But if I'm understanding, the only reason you can give me right now as to why you would need to identify prospective jurors by race would be innocent that someone inquired about that?

A Yes, sir.

Q Such as lawyers?

A Yes.A16-23

In *United States v. Fernandez*, Judge Friendly stated that a procedure for choosing a jury venire which tends to limit the proportionate representation of those living where the crime was committed raises a "difficult question." He went on to observe that "the appearance of abuses, if not...abuses, in the selection of what may be deemed a tribunal favorable to the prosecution,'.. enhances our disfavor...." 480 F.2d 726, 734 (2d Cir. 1973).

Petitioners should have had a hearing. The demographics analysis by the jury administrator who was unaware of race and it's impact is telling. She only collected racial data to answer questions of lawyers. The following statement made by the Supreme Court in *Peters v. Kiff*, 407 U.S. 493, 503-04 (plurality opinion), and cited favorably by *Taylor* suggest the problem was requiring a showing that the excluded group differs from that from which the jury was selected.

"[The] effect [of the exclusion] is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps

unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected important in any case that may be presented." *Zicarelli v. Gray*, 543 F.2d 466 (3rd Cir. 1976)

Petitioners are not without an explanation as to why the Court did not simply order a Greenville Division Jury Panel. While this procedure would not have resolved the problem of local expense and otherwise rights of the vicinage, it would have eased the pain somewhat. The procedure was available and requested.

Petitioners are troubled by the refusal of the Court to seek alternatives that were available that would have lessen the disproportionate impact. *Mallett v. Missouri.* (Marshall & Brennan, J.J., dissenting) unjustified transfer of venue to county with no inhabitants of defendants race violated fundamental equal protection rights under *Batson v. Kentucky*, 476 U.S. 719 (1986).

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. *Thiel v. Southern Pacific Co.* 328 U.S. 217, 220 (1946). It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law - that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. *Powers v. Ohio* 499 U.S., at 409 ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process. When persons are excluded from participation in our democratic process solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized. *J.E.B. v. Alabama* 511 U.S. 127, 146 (1994). This Court has said that the Jury Selection Process need to be tighten-up The Court need to constitutionalize jury selection procedure. O'Connor, J., concurring 511 at

147. We pray now. One day late causes a conviction!

Sympathic, fair, honest, farmer jurors was what Petitioners were looking for in the jury selection process. Race matters. Farmers matters and everything matters when life hangs in the balance on something as simple as the ambiguous statement asked Petitioners, "when did you about plant your cotton?" This is especially true when all farmers know that USDA personnel fill out all of the applications. They supply the dates, times, etc. If the crop adjuster said "use May 25" that is what they use including Petitioners Exact dates are foreign to farming. Farmers should have been allowed to participate in the jury selection process. A farmers life experiences would have been relevant to his or her view in the case. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them" *Tech v. Alabama*, 447 U.S. 625, 642 (1980). But to say that race makes no difference as a matter of law is not to say that race makes no difference as a matter of fact. The jury pool must be a representative of the community, but that is a structural mechanism for preventing bias, not enfranchising it. *J.E.B. v. Alabama*, 511 U.S. 127, 154 (1994). Thus, this Court must speak now and set guidelines on the Jury Selection Process in Federal Courts.

Greenville Division/Oxford Division Where Lies the Public Interest, Convenience, and Necessity? Should the Electronic Courtroom be given Preference over 61 Witnesses and Defendants Situation.

Jury Panel No. 77 was the name given to Petitioners Venire. A-24-40. . The chart outlines the demographics, social status, location, occupation and distance of the 83 potential jurors from Oxford. The chart shows that Blacks were not fairly represented. Add to this, the testimony of the Jury Administrator and this Court should have concerns. The Oxford trial was for the convenience of the Jury and

U.S. Attorneys. If not, why would 61 witnesses who did not testify because of the distance involved. Anyway you look at it, the policy of an "electronic courtroom" is not good enough. A-39

The District Court race neutral plan of 1/3 from three of the four judicial divisions is not per se unconstitutional. Petitioners are not prepared to say that the plan was designed to operate to minimize or cancel out Black jury participation. The Court's plan when focused on the actual effect of its' operation, minimize or cancel out Black jury participation in the Mississippi Delta in a big way. The Mississippi Court Plan is constitutional infirm where petitioners can demonstrate that "its [Black] members had less opportunity than did other residents in the district to participate in the Political [Jury Selection] and be selected as jurors. This court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where petitioners can prove a panoply of factors rooted in racial discrimination at the circuit clerk level in the Delta Division, coupled, with lack of access to the Jury Selection Process a prima facie case is made. The numbers make out a strong case of racial exclusion in voting and spills over to voter participation.

To be blunt but to the point, Black jurors are not encouraged to participate in the jury selection process. This court may take judicial notice of the long line of cases involving the denial of Voting Rights in Mississippi. In this case this Court found the State of Mississippi's long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting...remarkably successful "(380 U.S. at 135-136). This Court also found allegations that "the common purpose running through the State's legal and administrative history [of the past seventy-five years] has been to adopt whatever expedient seemed necessary to

establish white political supremacy..." (Id. at 143-44) borne out by the State's words and actions, and their statistically proven effects. *United States v. Mississippi*, 380 U.S. 128 (1965).

It is no secret that out of the 20-21 majority Black Delta counties in Mississippi there are only three circuit clerks that are Black. This is a position that is dangerous to Blacks and the fight to keep Blacks out of this position persist. Even as we seek review here, the federal mandated voter participation bill is dead in the Mississippi Legislative because Legislators insist that a valid drivers license must be presented at all election to prevent voter fraud. Circuit clerks are against the bill to upgrade voter registration and the Federal Mandate. Enforcement of voter registration Motor-voter or Mail-in voter registration in Mississippi is lacking. The statistics speaks for themselves.

The Mississippi State Conference of the "NAACP" has attempted to get the Secretary of State in Mississippi to find a balance between discriminatory voter roll purging and legitimate cleaning up the books. Washington County, Greenville has nearly 50% more voters on the rolls than there are live voters. This might account for the Northern District Court of Mississippi small response to jury questionnaires. Additionally, homelessness, poverty, lack of employment causing people to move around and many other factors that come into play in questionnaires/selection process. Petitioners believe that an obligation exist to ensure that one third potential jurors come out of the process into the courtroom. There are still structural barriers to Black voter's access to the ballot...but any fair process would take into consideration the nature of the population that is being serviced. Enhancement measures must be employed by the Federal Court office to obtain a true third of the population in the jury venire is required. Just as this Court has accepted the 65% Black election district as the only means to ensure black will be able to participate in the political process and

elect candidates of their choice in Mississippi, so must selection of jurors in the Delta be enhanced. Starting at 65% Black general population then look at voter age population in Mississippi, the 5 to 8% disparity now has the figures at 57% Black. An examination of the Black/White voter registration will reveal yet another gulf between the races now we are in the 51% range. The examination in Mississippi of the voter turn out at the last election reduces the once 65% Black majority to a 51-52 white majority, 47-48 Black minority which makes the district equal. It should be clear to all that a 65% Black rural Mississippi election district is not a safe Black district. Thus, if the divisions are divided into 12,000 persons per division, perhaps the Greenville Division should have more than 12,000 and some mechanism should be employed, other than voter registration rolls and circuit clerks assistance, to enhance Delta participation. Why not use historical black colleges and universities personnel to help. The system as applied is fraught with failure.

Reason for Granting the Writ: There Are Conflicts Within Many of the Circuits as to the Implementation of 28 U.S.C. § 1861 and the Jury Selection Process

This case is the utmost national importance in that Black people as it currently stand, are not constitutionalized in the jury selection process, such that race might be considered a factor in both transferring a case out of the divisions and those divisions that cases are transferred to. In other words this Court is invited to revisit *Duren v. Missouri*, 439 U.S. 357 (1979); *Mallett v. Missouri*, 494 U.S. 1009 (1990) Justice Marshall, with whom Justice Brennan joined dissenting which has evolved into "Blacks do not matter in the jury selection process" and race cannot be a factor in considering both the Fifth, Sixth, Fourteenth and Fifteenth Amendment applicability to the jury selection process.

The primary reason this Court should hear this case is

that it was not only decidedly wrong by the Court's below, but the sentencing err was acknowledge by both Court's but nothing was done. Moreover, the issue of jury districts/divisions verses venue districts/division is complex and need to be constitutionalized in America. A-73.1, A-22 [are there 3 or 4 Divisions/why have separate jury boundaries?]

We begin with the *Mallett* declination; Justice Marshall stated:

"The court's transfer decision reduced the number of Afro-Americans on Mallett's venire; the virtually unrestricted discretion of the trial judge to make the venue determination presented an opportunity to discriminate; and the judge transferred the case to a county with no members of Mallett's race. The trial judge failed to offer a 'specific or compelling' neutral explanation for the transfer. *Mallett*, 494 U.S. at 1009-10. (*Mashall, J.*, dissenting). This is what is occurring here.

The Fourteenth amendment's equal protection guarantee requires more than just a showing of unfavorable, racial impact. *Washington v. Davis* 426 U.S. 229, 242 (1976). Petitioners must demonstrate, above unfavorable impact, circumstantial evidence to prove discriminatory intent. *Arlington Heights v. Metropolitan Housing Corp.* 429 U.S. 252, 267 (1977) (historical background, specific sequence of events, departures from normal procedures, etc.).

Such is not the case in actions seeking to demonstrate racially biased selection procedures for juries. *Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972) *citing Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (after prima facie case made of invidious, race-based discrimination, where State fails to show that jury commissioners selected white grand jurors for race-neutral reasons, "'the opportunity for discrimination was present and [it cannot be said] on this record that it was not resorted to by the commissioners'");

Hill v. Texas, 316 U.S. 400, 404 (1942) (it is well established that jury commissioners may not "pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds"). In particular, in *Norris v. Alabama*, 294 U.S. 587, 591-92 (1935), the Court determined the fact that blacks constituted a substantial segment of the population of a given county, but that none of the blacks were called to jury duty established a prima facie case, in and of itself, of systematic exclusion of blacks from the jury system.

In changing a federal trial from a Black division to at- large in a foreign place is shocking to the conscienous. The Court ought be compelled to take into account the racial composition of the alternative venue coupled with reasons for the transfer. The electronic courtroom should not be favored over persons.

There are 4 Divisions, the Delta Division in Clarksdale, Greenville Division, Oxford Division and Aberdeen Division. At least since 1970 the Clarksdale Division have never had a Federal Judge, nor are trials held there regularly. The Division from day one has been ghettorized, downsized and underutilized. No Black person has ever held a Judicial position in the Northern District of Mississippi. Trials have never been held regularly in Clarksdale!

Petitioners are amazed at both lower Courts accepting Clarksdale as being in the Oxford Division. Clarksdale is a Delta town and has nothing in common with Oxford other than racial dilution of the jury selection process. A-23. In fact the Oxford jury division called Oxford/Delta Division is a phantom. Phantom according to Webster means...something feared or dreaded. A person or thing that is something in appearance but not in fact. 28 U.S.C. 104 is not being followed. There is no legally cognizable Black citizens this Court intervenes. Race is the only reason this marriage exist and it is time for a divorce.

THE CONVICTIONS SHOULD BE REVERSED

A natural disaster occurred in 1998 causing the U.S. Congress to enact legislation to help farmers and to provide financial assistance for those farmers who suffered substantial crop production loss, on certain eligible crops, due to the disaster. This legislation is referred to as the 1998 CLDAP (Crop Loss Disaster Assistance Program). A-136. In order to initially qualify to seek benefits under this legislation, a farmer must have experienced a production lost greater than thirty-five percent (35%) of his/her **average yearly** crop production/yield for the specified/eligible crop on the claimed piece of land (historical data) or the overall average yearly crop production/yield for specified/eligible crop in that county (determined by process by/through the local FSA office).

The legislation initially provided for farmers to receive entitlement benefits as early as February 1, 1999 and April 9, 1999 was established as the formalized **sign-up deadline.**

Because of the "farmer friendly" policy, FSA encourages all farmers who suffered crop production losses with the specified/eligible crops, because of the natural disaster, to complete or make application for relief. The FSA, normally through its local COC (County Operating Committee), will apply program criteria to determine if the farmer qualified (met criteria) to participate in the disaster program and, if so, how much compensation would be received.

Although the Wheelers were made aware of the sigh-up deadline for the 1998 CLDAP through the local county, March 11, 1999 FSA Newsletter A-86, they were not aware at the time of sign-up, 5 April 99, of the criteria for qualification for the disaster program and/or the amount of compensation to be received if they did qualify for the

Program. The county FSA office determines the average yearly crop productions/yields for the county or for an individual farm; the State of Mississippi FSA Committee (STC), pursuant 1-DAP [Disaster Assistance Programs], subparagraph 1065D, determines/establishes the crop production factors for COC double cropping practices; and the USDA determines what percentage of the State determined loss amount will be paid for by a national payment factor.

The State FSA Committee, pursuant to subparagraph 1065D of 1-DAP, established the crop production factors for COC double cropping for cotton at .3300 (33%) on 8 April 1999. The USDA determined that federal funds could be used to pay up to 84.9% (national payment factor) of the FSA County Committee determined loss amount some time after the 9 April 1999 sign-up. When one signs-up or makes application to participate in the disaster program, he/she signs a CCC [Commodities Credit Corporation] form 540A. The CCC Form 540A is the farmer's Notice of Loss and it evidences the farmers intent to participate in the loss assistance program, if s/he [the listed farm] meets the programs requirements. There is no indication on the CCC Form 540A as to any amount of money a farm/farmer can or might receive. Most of the information shown on this CCC-540A is downloaded automatically from the system of records maintained by the local county FSA office. If any additions are had (besides the farmer's signature), they are performed by FSA personnel. Only after the farmer has signed the CCC-540A will s/he be given a copy of CCC-540E, Producer Entitlement Report that indicates "**Projected Payments for Initial Application** Because the applications of Petitioners were not processed and ineligible for the program the convictions should be vacated.

ERR IN SENTENCING CALCULATION

Trial testimony and evidence presented at the sentencing hearing did not clearly identify the facts, policies and procedures surrounding the Crop Loss Disaster Assistance Program. A farmer is made aware, through/by the local FSA office, that a disaster program has been approved and encouraged to make application to determine if s/he meets the requirements to participate. The farmer/producer makes application (CCC-540A) and subsequently receives a Producer Entitlement Report, Status = "Projected Payments for Initial Application" (CCC-540 E). This CCC-540 E is just a projection presented by the FSA, not the farmer, based on information the FSA has in its system and has attributed to that farm. The farmer has no idea of the amount of payment s/he will receive because initial qualification criteria for the program and any of myriad adjustments required by program implementing regulations have not been applied. In fact, page 2 of the CCC-540 E contains a DISCLAIMER: "The calculated payment amounts reflected on this entitlement report may vary due to RMA-provided data, payment acres, payment yields, producer eligibility, producer payment share, crop production, payment factor, and national payment factor. The distribution of this form does not, in any way, obligate CCC [commodities Credit Corporation] to disburse the payment amounts reflected..."

The farmer does not ask FSA personnel or demand in the application any specified amount. The FSA office determines if a farmer qualifies and which adjustments and factors are to be applied. In other words, making application (signing the CCC-504A) places a farmer in a pool to be considered for participation. When the FSA and COC process all applications, they first determine if a farmer meets qualifications to participate; if a farmer does not, that application is simply pulled from the pool and no further consideration is given to it. There are or may be few or many reasons why a farmer would not qualify to participate.

If a farm/farmer initially qualifies to participate in the program, the FSA and COC then must determine which, if any, adjustments and factors must be applied to each farmer because of farming practices, crop production history, insurance or non-insurance purchase and federal funding limitations. Most of the information used is already in the FSA system. The individual farmer usually is not involved in the determination process. Only after this process is over will the farmer receive a notice from FSA stating that his application has been approved and the amount for which it was approved.

Applying the process and program criteria to the application, CCC-540A, Lawyer Wheeler, Jr., is clear. His cotton crop, located in Sunflower County was planted behind wheat grain, creating "double cropping". The FSA was aware of the wheat crop because it was enrolled in the RMA-insurance program – this fact was never challenged during the trial because it was patently obvious. He made application for disaster relief (signed the CCC-540A), and indicated that the farm was non-irrigated. The initial Producer Entitlement Report (CCC-540E) clearly shows the irrigation status in Part A under the subtitle "Payment Yield": the acreage is listed underneath the "NI" which abbreviates "Non-Irrigated". On form CCC-540A, the form for which he was indicted, there is a Part A block 9 which was marked with an "X" in the blank representing "Non-Irrigated"; and, in Part C, block 18, there is a "Prac" which contains the alphabet "N", indicating "Non-Irrigated". Therefore, 1998 CLDAP guidelines, he simply, was <u>not eligible</u> for <u>any</u> benefits based on this application. The application would/should have been pulled from the pool of applications and no further consideration given. The farm simply did not qualify for participation. The trial record, including the testimony of experts for crop insurance and specialists for FSA and the CLDAP clearly stated, "that no cotton crop" "double cropped" behind a harvested small

grain crop (wheat) is eligible for crop insurance or disaster benefit unless it is irrigated.

Thus, Petitioner was not entitled to and would have received no compensation based on this application. The calculated amount of loss to be used to determine sentencing should be $00.00. The PSR should be amended to reflect said loss amount and Petitioner re-sentenced accordingly.

Assuming arguendo that the Court fails to accept Petitioners argument and position set out above, the Court must still find that the amount of loss was calculated incorrectly. If his farm had qualified to participate in the 1998 CLDAP and gone through the benefit determination process, the amount of loss could not and would not have been $58,470 as claimed by the prosecutor. This initial projected payment amount would be reduced by 33%, the State "double cropping" reducing factor: .33 X 58,470 = $19,295. $58,470 - $19,295 = $39,175. This $39,175 must now be multiplied by the national/federal payment factor of 84.9% . .849 X $39,175 = $33,259.60. Thirdly, the Sunflower County technician stated in the trial record, that they knew that the cotton had been planted after wheat. When the date of actual cotton planting completion June 15, is factored into the loss calculation figure it results in an assigned total production 63117 lbs. When the assigned production is added to the harvested production it calculates a negative payment. Therefore, accepting that Lawyer Wheeler, Jr. qualified to participate in the disaster program, the amount he could/would have received is –0- and he would need to be sentenced in accordance therewith.

The positions and arguments set out above for Lawyer, Jr., is now to be applied to Dr. Wheeler. The only difference will be that one of the two farms located in Leflore County was irrigated. The larger of the two farms, known as "Mayre Place", was not irrigated and, therefore, did not qualify to participate in the 1998 CLDAP. The application (CC-540A) and the initial Producer Entitlement

Report (CCC-540E), both indicate that the farm was not irrigated. Further, it was known that the acreage was "double cropped". The application should/would have been pulled from the application pool and no further consideration given. Petitioner would not have received any disaster compensation for this farm, therefore, the loss amount for sentencing purposes for this farm would and should be $00.00 instead of the $142,917 postured by the government prosecutor.

The smaller farm, known as "Hard-rock", was irrigated and the application (CCC-540A) and the initial Producer Entitlement Report (CCC-540E), both indicate that the farm was irrigated. Pursuant to 1998 CLDAP guidelines, this farm met the initial qualifications to participate; however, the amount of possible compensation was/is not $32,313 as the prosecution posits. Applying the guidelines, the $32,313 projected payment amount would be reduced by 33%, the State "double cropping" reducing fact: .33 X 32,313 = $10,663. $32,313 - $10,663 = $21,650. This $21,650 must now be multiplied by the national/federal payment factor of 84.9%. .849 X $21,650 = $18,381. Thirdly, applying the same formula as the Carroll County FSA committee applied to the dismissed count 5 involving the Carroll county farm. The reduction calculations resulted in a total production assigned of 40,041 lbs. When the total production assigned is added to the harvested production it also calculates a negative payment. The Leflore County FSA committee if they had processed the appellants CCC-540 disaster application would have assessed him a negative value.

PETITIONERS ARE ELIGIBLE FOR PAROLE

The Record indicates that Lawyer, Jr. went to the FSA office in Sunflower County because his farm was located in Sunflower County. He only visited the Sunflower

County FSA office once in relation to making this application. There is no evidence suggesting he made numerous trips to the FSA office providing different and/or conflicting information nor when he did not meet Program criteria. In fact, the weight of the evidence is overwhelmingly to the opposite affect: Lawyer, Jr. neither denied or tried to hide the fact that the farm was being "'double cropped' nor that the farm was" Non-Irrigated.

Lawyer, Jr. submits that it stretches credulity to suggest some type of advanced or expanded planning was involved. It defies logic to say that he exceeded minimum planning in deliberately providing a wrong date, which only reduces the possible compensation, while at the same time he provides the information, "Non-Irrigated", that would automatically disqualify him/his farm from participating in the disaster program altogether. There was simply no way that he could have known of the impending disaster at the time that the information was provided to the crop insurance agent on July 5, 1998. No planning over an extended period of time was involved.

Dr. Wheeler's situation is similar to that of his brother. Dr. Wheeler went to the FSA offices in Leflore and Carroll Counties because his farms were located there. He only visited the Carroll County FSA office once in relation to making the disaster application. Dr. Wheeler visited the Leflore County FSA office on two different occasions in reference to making application for disaster relief, the facts and circumstances of this second visit should be explained and understood.

After receiving notice and, being contacted by Ms. Ricks, he proceeded to the Leflore County FSA office to make application for the 1998 CLDAP. The CCC-540As indicate that signatures were affixed on or about May 12, 1999. There is no evidence suggesting that he made numerous trips to the FSA office providing different and/or conflicting information nor that he initiated contact with the

FSA personnel in an attempt to influence them to make an exception and qualify him to participate when he did not meet Program criteria. Petitioner neither denied or tried to hide the fact that the farms were being "doubled cropped" nor that the farms were "Non-Irrigated." (CCC-540As & CCC-54Es).

There is no evidence that Petitioner had even thought about the application since April 5, 1999. No evidence was produced to indicate that Harold Wheeler did anything more than, again, affix his signature. In fact, nothing is shown to indicate in any way that his actions on May 12, 1999 were designed and/or did lead to his qualifying for and receiving anything not already requested in the April 5, 1999 application. Petitioner did not plan or initiate the May 12, 1999 activities!

Petitioner invite the Court to consider why he would be contacted and asked to return to the Leflore County FSA office on May 12, 1999, more than one month after the sign-up deadline, to apply for the same Program he had applied for on April 5, 1999? Applications filed after the April 9, 1999 sign-up deadline could not and would not be considered or processed. This question (the May 12, 1999 requested return to FSA office) is much more seminal when considered in light of the May 5, 1999 Memo from the Leflore County FSA office addressed to the State FSA Office, which suspects CMC Farms (Harold Wheeler) of Program abuse and referred the matter for compliance investigation.

Petitioners submit that the actions described above certainly do not meet definition of "more than minimum planning." Lawyer Wheeler, Jr., traveled, on one occasion, to the FSA office and issued an erroneous statement about his cotton planting date. His action was the epitome of basic and simple. Harold Wheeler's actions were similar, except that he was asked by FSA personnel to re-apply on May 12, 1999 for what he had previously applied for on April 5,

1999. This re-applying should not be looked upon as "repeated acts over a period of time." At worse, this May 12 date was "purely opportune." In addition, the information presented in the CCC-540 May 12, 1998 was already completed prior to the defendant arriving at the FSA office. **date of application**. Petitioners qualify for probation at the most.

CONCLUSION

The prosecution's presentation of a false picture of the evidence to the finder of fact and the jury thought that a conviction on one count of fraud would not cause that much harm. Dr. Wheeler is about to lose his license to practice medicine and will go to jail for no good reason. Any farmer who have known the operation of USDA/FSA. Lawyer Wheeler, Jr. just happen to be the brother.

Respectfully Submitted,

Alvin O. Chambliss, Jr.
CHAMBLISS & ASSOCIATES
3022 South Lamar Blvd.
Oxford, MS 38655
662-234-4321

Counsel for Petitioners

APPENDIX

APPENDIX
TABLE OF CONTENTS

PAGE

Fifth Circuit Opinion .....A1 – A14
Order Denying Petition for Rehearing.....A15
Trial Transcript – Mary Ann Rambo .....A16 – A23
Jury Plan U.S.D.C. Miss. (Jury Selection Act).....A24 – A40

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60830

United States of America
Plaintiff - Appellee,
versus
Harold J. Wheeler; Lawyer Wheeler, Jr.
Defendants - Appellants.

Appeals from the United States District Court
For the Northern District of Mississippi
4:01-CR-109-1-B

Before REAVLEY, JONES and CLEMENT, Circuit Judges.
EDITH H. JONES, Circuit Judge:

Harold J. Wheeler and Lawyer Wheeler, Jr. appeal their convictions for knowingly making materially false statements or representations to the Farm Service Agency ("FSA"), an arm of the United States Department of Agriculture, in violation of 18 U.S.C. § 1001(a)(2). Specifically, the jury found that the Wheelers falsely stated in their 1998 applications for disaster relief that they had completely planted their cotton crop on May 25, 1998, and May 26, 1998. Harold J. Wheeler was sentenced to 18 months imprisonment and fined $20,000. Lawyer Wheeler, Jr. was sentenced to 12 months and one day imprisonment and fined $5,000. Finding no error, we affirm the convictions.

I. BACKGROUND

Harold Wheeler, managing partner of CMC Farms, owned and farmed several tracts of land in Leflore County and Carroll County, Mississippi. His brother, Lawyer

Wheeler, was employed by CMC Farms and also rented and farmed his own tract of land in Sunflower County, Mississippi. In the fall of 1997, the Wheelers decided to plant wheat on their respective tracts of land. The wheat came to harvest in late May 1998 and a local trucking firm delivered the wheat to grain elevators beginning May 23, 1998. The final delivery occurred on June 12, 1998.

The Wheelers then decided to follow their wheat crop with cotton. Inventory receipts from Lewis Seed & Feed establish that Lawyer Wheeler picked up the firm shipment of thirty-three bags of cotton seed on June 3, 1998. Receipts also establish that Lawyer Wheeler or another representative of CMC Farms picked up additional shipments of cotton seed on June 4, 11, and 15, 1998. Following the harvest, the Wheeler tracts yielded a mere 70 bales from more than 1,000 acres of cotton planted.

The Wheelers held crop insurance on their 1998 cotton crop through Rural Community Insurance Services. Based on information provided by Lawyer Wheeler, insurance agent Jimmy Goss filled out the crop insurance acreage reports, which included final planting dates ranging from May 15, 1998, to May 23, 1998. According to their applications, the Wheelers qualified for full coverage.

The FSA's Crop Loss Disaster Assistance Program provides compensation for loss associated with a particular farming period. Congress passed the disaster program covering the 1998 growing season in early 1999. To qualify for full coverage under the disaster program, cotton must have been completely planted by May 25, 1998. For every day past the 25th that planting continues, the disaster benefits decrease.[1]

---

[1] For crops planted up to ten days past the final planting date, the award would be reduced 1% per day late. For crops planted between eleven and twenty-four days past the final planting date, the assigned production would be based on 10% of the payment yield, and an

On April 5, 1999, Harold Wheeler met with Brenda Ricks, an employee of the Leflore County FSA office, to complete his disaster application for non-irrigated acres. Based on Harold Wheeler's answer to her questions, Ricks noted that the planting date for CMC Farms was May 25, 1998. Wheeler returned to the Leflore County FSA office on May 12, 1999, to complete the same disaster application for irrigated acres. Wheeler assured Ricks that the planting date for the irrigated acres was the same as that for the non-irrigated acres, i.e., May 25, 1998. Harold Wheeler filled out a similar application in Carroll County, but was not asked about his final planting date.

Also on April 5, 1999, Lawyer Wheeler visited the Sunflower County FSA office to complete a disaster application. Lawyer Wheeler met with Jo Muzzi, an experienced FSA office employee, who filed out the application based on his responses to certain questions. Muzzi noted on the application that Lawyer Wheeler's planting date was May 26, 1998.

Both Harold Wheeler's and Lawyer Wheeler's disaster applications were held up for investigation by the office of the Inspector General. Thus, neither Wheeler brother received any disaster relief benefits.

On September 19, 2001, Harold and Lawyer Wheeler were indicted on six counts by a federal grand jury. The indictments covered the allegedly materially false statements made by Harold and Lawyer Wheeler on their crop insurance acreage reports and disaster applications for Leflore County, Carroll County, and Sunflower County.

The trial was originally scheduled to begin on November 13, 2001, in Oxford, Mississippi, the seat of the

---

additional 2% would be deducted for each day (between 11 an 24 days) late. Finally, for crops planted 25 days late or more, the assigned production would be based on 50% of the payment yield. See 7 C.F.R. § 1477.110(g)(1)-(3) (2003).

Western division of the Northern District of Mississippi. However, the trial was continued several times on motions from the defendants and finally began on May 20, 2002, in Oxford. Before trial, the Wheelers objected to holding the trial in the Western division and requested a transfer to the Greenville division of the Northern District, citing as reasons the convenience of the parties and the larger percentage of African-American residents. On April 2, 2003, the district judge denied the Wheeler's request for a transfer, noting the usefulness of the more modern courtroom facilities in Oxford. In addition, the district judge ordered a district-wide, as opposed to division-wide, venire in response to the defendants' concerns.

On May 22, 2002, three days into the trial, the defendants filed a motion to quash the jury based on the divergent percentages of African-American and farmer residents in the Northern District compared to the Greenville division. After hearing arguments and testimony, the district judge denied the motion.

At the close of the government's case, the defendants filed motions for judgment of acquittal as to all counts. The motion was granted as to count five against Harold Wheeler, which dealt with his disaster application in Carroll County, but denied as to the remaining counts.

At the close of the trial, defendants unsuccessfully reasserted their motion to quash the jury. The jury returned a verdict finding Harold Wheeler guilty only as to count six, relating to his disaster application in Leflore County, and Lawyer Wheeler guilty only as to count four, relating to his disaster application in Sunflower County. Defendants' joint motion for judgment of acquittal was denied. Sentencing took place on September 10, 2002. Both the government and defendants objected to the presentence report. The defendants' objections to the guideline loss determination were overruled. However, the government's request for an

inclusion for more than minimal planning was sustained.

II. DISCUSSION

This court reviews a district court's decision to transfer venue for abuse of discretion. United States v. Dickie, 775 F.2d 607, 609-10 (5th Cir. 1985). In addition, a "substantial ground for overturning the district court's decision" must be present. United States v. Lipscomb, 229 F.3d 303, 339 (5th Cir. 200). Federal Rule of Criminal Procedure 18 requires the government to "prosecute an offense in a district where the offense was committed." The district court, when setting the case for trial within the district, must consider "the convenience of the defendant and the witnesses, and the prompt administration of justice." Id. However, a defendant has no constitutional right to be tried in a particular division within a district. United States v. Duncan, 919 F.2d 981, 987 (5th Cir. 1990).

The offenses at issue all occurred in Mississippi's Northern District. This case was originally set for trial in Oxford, located in the Western division of the Northern District, in compliance with Rule 18. The defendants made a motion to Rule 18, requesting an intradistrict transfer to the Greenville division, which the district court denied. To support their motion, the defendants argued that (1) the alleged criminal conduct arose from their farming activities in Leflore, Carroll, and Sunflower counties, all in the Greenviile division, (2) both defendants resided in the Greenville division, (3) many of the defense witnesses resided in the Greenville division, and (4) the African-American population in the Greenville division exceeded that of the Western division.

The defendants cite Lipscomb, supra, in support of their position. Lipscomb involved the reversal of a Dallas City Council member's conspiracy and bribery convictions. The district judge in Lipscomb transferred the case sua sponte from Dallas to Amarillo, some five hours away, even

though the defendant and all the witnesses lived in Dallas. 299 F.3d at 337, 340. However, Lipscomb is inapposite to this case.

A district court is not required to grant an intradistrict transfer request absent a "strong showing of prejudice" by the defendants. Duncan, 919 F.2d at 985. In overruling . the motion, the district judge noted the electronic courtroom in Oxford as one factor weighing against transfer.

However, he also noted that Oxford is closer to Lawyer Wheeler's home in Clarksdale (which is actually located in the Delta division) than to Greenville, the seat of the Greenville division, and that Harold Wheeler's home in Carrollton is only a few miles closer to Greenville than to Oxford. In addition, although some of the defense witnesses lived closer to Greenville, others lived closer to Oxford. The Greenville division's higher population of African-American residents should not influence the transfer decision. See United States v. McKirmey, 53 F.3d 664, 673 (5th Cir. 1995) (noting that "an attempt to influence the racial balance of the jury by setting a case in a particular division would not have been appropriate or acceptable"). The convenience of the defendants and the witnesses was duly considered by the district judge in overruling the motion and, based on the foregoing, the district court did not abuse its discretion by declining to transfer the case to the Greenville division.

B. Motion to Quash

Appellants complain that the district judge erred in denying their motion to quash the jury venire. They argue on appeal that because substantially more African-Americans and farmers reside in the Greenville division than in the larger Northern District of Mississippi, they were denied a jury that represented a fair cross-section of the population as guaranteed by the Sixth Amendment of the United States Constitution.[2] See McKinney, 53 F.3d at 671.

---

[2] The defendants failed to move to stay the proceedings prior to

In denying the motion, the district judged noted that the venire was selected by the computer at random from registered voters within the Northern District.

To establish a prima facie violation of the fair cross-section requirement, the Appellants must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) the representation of this group in the venire panel is not reasonable in relation to the number of such persons in the community; (3) that this under-representation is due to systematic exclusion in the jury selection process." Id. (citing) Duren v. Missouri, 439 U.S. 357, 364 (1979)). African-Americans qualify as a "distinctive group" for purposes of the fair cross-section requirement. United States v. Williams, 264 F.3d 561, 569 (5th Cir. 2001). Because the district court determined that the selection process was random and computer-generated, there could be no "systematic exclusion" of African-Americans. This factual determination is reviewed for clear error.

The Appellants argue that the African-American population in the Northern District of Mississippi amounts to 43.1%, but that only 22% of their venire panel was comprised of African-Americans, However, the Appellants must prove not only that African-Americans were under-represented in their case, but that they were systematically under-represented in other venires drawn from the Northern District. Williams, 264 F.3d at 568. The Appellants offer no evidence tending to prove that African-Americans were so under-represented and thus fail to establish a prima facie violation of the fair cross-section requirement. The district court did not err in denying the

---

voir dire and failed to file a sworn statement of facts, as required by statute. 28 U.S.C. § 1867(a), (d) (2000). Although the defendants failed to comply with the statutory procedures for challenging the jury venire, they may still assert a constitutional violation. United States v. Williams, 264 F.3d 561, 567 n.3 (5th Cir. 2001).

Appellants' motion.[3]

C. Sufficiency of the Evidence

This court reviews denials of motions for judgment of acquittal de novo. United States v. Wise. 221 F.3d 140, 147 (5th Cir. 2000). The evidence is reviewed in the light most favorable to the government to determine whether a reasonable factfinder could find the evidence proves guilt beyond a reasonable doubt. United States v. *Bell*, 678 F.2d F47, 549 (5th Cir. 1982) (en banc). aff'd, 462 U.S. 356 (1983).

1. **Knowingly False Statements**

A violation of 18 U.S.C. § 1001(a)(2) is committed knowingly making a materially false statement or representation, in any matter, within the jurisdiction of the United States Government, here, the United States Department of Agriculture. 18 U.S.C. § 1001(a)(2) (2000). Harold and Lawyer Wheeler maintain that they began planting cotton on May 26, 1998. They assert that the FSA employees' questions regarding their answers were not intended to mislead the government. They additionally contend that the May 25th deadline was not known to them at the time they applied for disaster relief. All of these arguments were made to the jury.

Sufficient evidence was adduced at trial for a reasonable jury to believe that, contrary to their representations, Harold and Lawyer Wheeler did not begin planting cotton on May 26, 1998. Harold Wheeler continues to assert that he picked up 33 bags of cotton seed on May 26,

---

3 Appellants argue that the district court's decision to move the trial from Greenville to Oxford denied them a fair cross-section of the community in the jury venire by diluting the percentage of African-Americans in the venire. Because we find that this case was originally set for trial in Oxford and, contrary to Appellants' assertions, never transferred, there is no issue here as to whether a discretionary transfer to a location with a significantly smaller African-American population would violate the fair cross-section requirement.

1998, from Sanders Seed, Lewis Seed & Feed's supplier. However, a Lewis truck driver testified that he picked up the same 33 bags of cotton seed from Sanders and transported them to Lewis Seed & Feed on May 26, 1998. Uncontradicted documentary evidence proves that the same 33 bags were in fact picked up by Lawyer Wheeler on June 3, 1998, at Lewis Seed & Feed. In addition, the same documentary evidence proves that the Wheelers continued to buy cotton seed from Lewis Seed & Feed through June 15, 1998. The government also produced several witnesses who testified that the appearance of the Wheelers' cotton crops indicated an initial planting date of mid- to late June. Given the weight of evidence, a reasonable jury could properly conclude that the Wheelers did not begin planting on May 26, 1998.

Harold and Lawyer Wheeler further argue that the questions posed Co them by FSA employees were ambiguous, such that they believed they were to give their initial planting date, as opposed to a final planting date.[4] Harold Wheeler met with Brenda Ricks of the Leflore County FSA office on April 5, 1999. Ricks testified at trial that she would ask farmers, "[W]hat's your planting date or you can give me a range or either what day did you finish. . . ." Ricks testified that she remembered asking Harold Wheeler for his planting date, stating that "I just asked him when was it planted or the last day that he ended up planting it." Harold Wheeler's response was "May 25th." When he returned to the Leflore County FSA office on May 12, 1999, to fill out an additional application for irrigated acres. Ricks testified that she asked Wheeler if the planting date was the same as for the non-irrigated acres, and Wheeler responded "yes". Lawyer Wheeler filled out his disaster application for

---

[4] Even if the Wheelers believed they were to give their initial planting date, the evidence at trial was sufficient to prove that the date given - May 26, 1998 - was false even as a starting date.

Sunflower County with Jo Muzzi, who testified that she has always asked farmers, "When did you finish planting your cotton?" When asked if she questioned Lawyer Wheeler about the date he completed planting cotton, Muzzi responded that she did in fact ask him "when was your cotton planted." In response. Lawyer Wheeler gave May 26, 1998, as the relevant date.

The Wheelers argue that the questions were ambiguous and that they believed they were to give their initial planting date. However, testimony at trial proved that the final planting date of May 25th was well-known in the farming community as an important date for insurance and disaster relief purposes. Ricks and Muzzi testified that monthly newsletters were mailed to farm operators, like Harold and Lawyer Wheeler, detailing the final planting dates for various crops. Several of these newsletters were introduced into evidence and each one listed May 25th as the final planting date for cotton. Viewed in this context, the questions asked by both Ricks and Muzzi were not ambiguous. Thus, the evidence adduced at trial is sufficient to support a jury finding that the Wheelers made knowingly false statements to the FSA

2. **Material Statements**

The district court correctly instructed the jury that, in order to be found guilty of violating 18 U.S.C. § 1001(a)(2), the defendants' false statements must have been material. That is, the statement "must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" United States v. Gaudin. 515 U.S. 506, 509 (1995) (internal citations omitted). The Wheelers argue that the final planting date was immaterial to the FSA's award of disaster relief because (1) disaster from CCC-540A does not specific blank for the planting date, (2) the FSA employee in Carroll County did not ask Harold Wheeler for a planting date, (3) the FSA

downloaded the planting date from the crop insurance form, and (4) entitlement forms had already been prepared.

The government produced ample evidence at trial to convince a reasonable jury of the materiality of the final planting date. John Tanner, the FSA State Office Specialist, testified that the final planting date was "crucial" to the FSA's determination of benefits. The final planting date was so important that disaster benefits decreased the farther away from May 25th the farmer planted. In addition, both Ricks and Muzzi testified that they were instructed to ask the farmers about their planting date because it was important. That a specific blank did not appear on the disaster application for the final planting date does not alone render the date immaterial.[5]

The Appellants emphasize that the entitlement reports, illustrating the possible monetary award, were already prepared before their visits to the FSA offices and that the information was merely downloaded from the crop insurance forms. However, the evidence at trial illustrated that the entitlement reports were merely projections of the award for which the farmer would be eligible if the disaster application were accepted. In addition, the downloaded crop insurance forms merely provided the certified acreage or production, not the planting date. These arguments do not warrant disturbing the jury's verdict with regard to materiality. The government produced sufficient evidence at trial to' support a finding of materiality, and thus, the convictions should be affirmed.

D. Sentencing

1. Loss Calculation

---

[5] Count five against Harold Wheeler, relating to the Carroll County property/ was dismissed from the suit at the close of the government's case. Although the FSA employee in that particular office failed to ask Wheeler for his final planting date, this omission does not render the information immaterial given the wealth of other evidence to the contrary

When reviewing application of the Sentencing Guidelines, " [w] e accept district court fact findings relating to sentencing unless clearly erroneous, but review de novo application of the Guidelines." United States v. Deavours, 219 F.3d 400, 402 (5th Cir. 2000). In addition, "[a] district court's determination of the amount of loss caused by fraud is given wide latitude." United States v. Brewer, 60 F.3d 1142, 1145 (5th Cir. 1995).

In determining the amount of loss under U.S.S.G. § 2Fl.l(b), the district court accepted the PSR's recommendation of $188,715 for Harold Wheeler and $58,470 for Lawyer Wheeler. The figures represent the amount of relief calculated by the FSA entitlement reports based on the Wheelers' fraudulent disaster applications.[6] The Wheelers argue the amount of relief for which they would have been entitled, had their applications been completed correctly, should be subtracted from the loss calculation. They also note that because their disaster applications were held up for investigation, they never actually received any benefits.

The commentary to U.S.S.G. § 2F1.1 prescribes, "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.8 (1998). Thus, it is proper for a district court to "calculate loss based on the risk engendered by the defendant [s'] criminal conduct, even where the actual loss

---

[6] Harold Wheeler argues for the first time on appeal that $13,485, representing the disaster relief for the Carroll County property, should not be included in the loss calculation because count five of the indictment was dismissed. Assuming arguendo that the inclusion of the Carroll County amount was error, it is harmless. Subtracting the amount from the total guideline loss of $188,715 leaves Harold Wheeler with a loss of $175,230, which remains in the $120,000 to $200,000 range applicable for a seven-Level increase. U.S. SENTENCING GUIDELINES MANUAL § 2Fl.l(b) (1) (H) (1998).

was lower." Brewer, 60 F.3d at 1145. By misrepresenting their planting date, the Wheelers intended to receive as much disaster relief as they could, hence, they should be charged with the full amount for sentencing. In addition, evidence presented at trial and adopted by the district court at sentencing revealed that disaster benefits could be withheld entirely if the farmer fraudulently misrepresented a fact, such as a relevant date, when making his application. See 7 C.F.R. § 1477.109(c)(2) (2003). Thus, given the Wheelers' fraudulent misrepresentation, they most likely would not have been entitled to any disaster relief. The district court did not err in its determination of the appropriate sentencing loss.

2. More Than Minimum Planning

The Appellants argue the district court erred by imposing a two-level enhancement for "more than minimal planning" in response to the governments objection. U.S. SENTENCING GUIDELINES MANUAL § 2P1.1 (b) (2) (A) (1998). "More than minimal planning" is defined as "more planning than is typical for commission of the offense in a simple form," or "any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Id. at § 1B1.1, cmt. n.l(f). We review the district court's determination for clear error. United States v. Clements, 73 F.3d 1330, 1341 (5th Cir. 1996).

The district court noted that Harold and Lawyer Wheeler filed their false disaster applications in separate counties, but on the same day. Harold Wheeler visited the Leflore County FSA office several weeks later and again confirmed the false planting date. Lawyer Wheeler, on behalf of CMC Farms and Harold Wheeler, also reported false planting dates on the crop insurance forms, See United States v. Carreon. 11 F.3d 1225, 1241 (5th Cir. 1994) (for sentencing, a defendant may be held accountable for

acquitted conduct). Given that the Appellants' false statements continued for roughly one year, the district court determined that a two-level enhancement for more than minimal planning was warranted. This determination was not clearly erroneous.

III. Conclusion

For the foregoing reasons, the judgments of conviction and sentences are **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD J. WHEELER; LAWYER WHEELER, JR.,
Defendants-Appellants.

U.S. COURT OF APPEALS
FILED
DEC 02 2003
CHARLES R. FULBRUGE III CLERK

Appeals from the United States District Court
for the Northern District of Mississippi, Greenville
USDC No. 01-CR-109-B

ON PETITION FOR REHEARING

Before: REAVLEY, JONES, and CLEMENT, Circuit Judges.

PER CURIAM.

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT.

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

MARY ANN RAMBO, having been called as a witness on behalf of the DEFENADNT, after having been duly sworn, was examined and testified as follows:

Q. Okay, Let me make sure I'm understanding you. Do you mail questionnaires to everyone?
A. No, sir, only the names given to us from the circuit clerks.
Q. And what fashion does the circuit clerk choose the names?
A. They have a starting number that we provide for them and an increment number that will make up – I think we have 17 counties in the western division and within those 17 counties they will provide – each county will provide us with a certain number that make up the 12 thousand names.
Q Okay. And tell me if I'misparaphrasing you. In other words, in order for you to fill the 12 thousand you need for a given division of a court, you rely upon the circuit clerks?
A Yes, sir.
Q For the counties within that division?
A Yes, sir.
Q To provide you with a certain number from each?
A Yes, sir.
Q Okay. Do you have right off the top of your head, how many each county clerk would provide you?
A No, sir, I do not have that with me. I can provide that.
Q. Okay. But in each district, each division you would get 12 thousand?
A Yes sir. The eastern division we would mail out 12 thousand questionnaires. The eastern division – let me start over. The eastern, western, Greenville division we mail out

12 thousand questionnaires which would make up the 36 thousand of the Northern District of Mississippi.

Q Okay. Do you know whether the circuit clerk uses an alphabetical method of selecting?

A I believe they do. They're supposed to. They send us those lists.

Q Do you know how the circuit clerk out of all of the many voters within a given county, how the circuit clerk chooses whatever proportion of the 12 thousand she or he is going to send you?

A Okay. We give them a starting number, each county a starting number, they may go down to number 17, and then they are told to pull the increment number, which is – say it's the 21st person and then they go every 21st person until they give us 350 names form one of the counties from the Northern District of Mississippi.

Q And are these 21st persons chosen by hand/

A Some of this is automation. Some of these have it on computer and some do not, and so some of them are by hand. A few are by hand.

Q Do you happen to now which counties are by hand?

A No, sir, I have no idea.

Q Do you happen to have an idea how many persons there are that are citizens of the Northern District of this court?

A No, sir.

Q Do you happen to know or have any idea what proportion your jury represents to the total population in the district?

A No, sir, I have no idea. Our automation people could maybe pull that up. I have no idea.

Q Do you or have information that tells you the racial makeup of the district?

A I do not have that. It is not anything that we deal with daily, but upon request our automation people could find that

in the wheel, the makeup.

Q Okay. Let me hand you what I'm going to mark as Defendant's Exhibit One and ask you if you would take a look at that, please.

A This is the jury list that I provided to – is this you?

Q Yes.

A Okay.

Q Okay. How many jurors did you list on there?

A May I say something first?

Q Sure.

A Our attorneys request a jury list two weeks prior to trial date. If summons say 100 people, we have people that need to be excused for different reasons or we have people who have moved, people who are deceased, we have people who for whatever reason cannot attend.

Now, what you – the date on this was the seventh of May, which means you probably did not get a full list, you only got the information sheets mailed back at that time, and then you got a list of all the people that were still on that list that had not been excused.

Q Okay. Let me make sure I'm following you.

A Okay.

Q You send out a list that was larger than what you have there?

A No, sir. I would have sent to you whatever – if I had summonsed one hundred people from north Mississippi and 30 had been excused, by the time you got your list, then you would have gotten 70.

Q Okay.

A Because we cut it down, it's all on compute r—not cut down, we excuse, and was as we excuse, that number goes down.

Q Okay. Is it fair to say that you sent us 81 questionnaires?

A It is fair to say.

Q Okay.

A I have no idea how many is here, but I can count them if you wish.

THE COURT: No.

THE WITNESS: Okay.

BY MR. KEARNEY:

Q Do you recall that 81's about the number that you sent?

A Yes, I would say that's about right.

Q Did you, prior to sending that out, or have you since then, compared the numbers of African Americans as opposed to those who are white?

A I notice that you started out with 23 and then I noticed when my list, I think it was Friday, that you had 15 still down to come.

Q Okay.

A I was just checking that because I knew you were concerned about it.

Q Okay. Would it be fair for me to state that at the time that you sent those questionnaires and the cards out to count, that there was 18 African-Americans among the list and the remainder's white?

A At the time I sent it to you?

Q Yes.

A Could be.

Q Okay.

A Nods head up and down.)

Q Would you have any problem if my calculations indicate that that would be roughly 22 percent of the total? That if 18 of 81 is roughly 22 percent of the total that were black?

A I do not deal with – I don't pay attention to that so I really don't know what to say to you about this. This is not anything that I keep tabs on or that I look at.

Q Okay. You indicated that you sent us a card; is that

correct?

A That's correct.

Q Does the card identify the prospective jurors by color?

A It does.

Q Do you prepare that card?

A That card is prepared by the – it's the computer. It comes out of our jury wheel.

Q Okay.

A All of this is. The information sheets are the sheets that the jurors return to us giving us updated information on them.

Q Okay. So the – are you saying that the computer has that information and makes that – identifies –

A It just gives us a printout of the people that are one that jury list.

Q Okay.

A Of the ones – and we're still getting information from these people where they're requesting to be excused because of different reasons, and then we – when we excuse those people, their names come off the list.

Q Is there a reason that relates to the function of selecting the jury why you would program the computer to identify persons by race?

A Is there what?

Q Is there a reason that relates directly to the process of selecting juries –

A so that we would have that information upon request.

Q Okay.

A But it's in the computer program and our automation person is not here to provide that.

Q Okay. But if I'm understanding, the only reason you can give me right now as to why you would need to identify prospective jurors by race would be innocent that someone inquired about that?

A Yes, sir.
Q Such as lawyers?
A Yes.
Q Okay.
A Yes.
Q Okay. Now, you also mentioned that of the – like you gave the example of sending out one hundred questionnaires and possibly in the instance you got back one hundred, but you had to excuse some?
A Uh-huh.
Q Who would make that decision on excusing them?
A The jury clerks.
Q And would you be one of those persons?
A I am.
Q Would you do this as a committee or individually?
A We do it individually. We work panels – there's another jury clerk and we both divide up the work and this was my panel.
Q Okay. And this was the case that you worked yourself?
A Yes, sir.
Q Did you send out one hundred in this case or do you know?
A I think I send out one hundred then on this one.
Q And if in fact you sent us 81. That would mean that some 19 people either did not respond or you excused them?
A I think everybody on this list responded except for maybe four.

Now, understand. I work these panels every day and don't keep – this is not anything I keep up. It's just a matter of – if I have 15 letters that come in of people in the nursing home or people who have small children and stay-home moms, or whatever reason, that list starts getting down to smaller number, and then if I get down and if I need 40 for a criminal case and I have more than I need, then the computer

pulls out at random. Say I have 50 and I only need 40, it will give me 50 names at random to tell not to report.

Q And you program the machine to do that?

A I do not. The automation people that wrote the program do that. But punch the buttons to tell it to move them to tell them not to report.

Q Now, when the people are requesting to be excused, how do they accomplish that? Do they contact you personally?

A They fill out their – when they receive the summons there's an information form which is the one that you have provided that they filled out and mailed back to us and if they have a hardship, like I stated, if it's a stay home mom of small children, she'll write a letter that, I am not able to attend because I have small children or I have no transportation or I'm sick or this person's in the nursing home or whatever, then we excuse them, these people, and we mail a letter to them. Their name comes out – their name comes out of the panel.

Q Okay.

THE COURT: Touch that mic. Is it on?

COURTROOM CLERK: I've got it on here.

THE COURT: We're going to interrupt this in two or three minutes if you're not through, and call the jury in and take it up later.

BY MR. KEARNEY:

Q Do you have either written or a set criteria that you use in order to excuse jurors?

A Yes, sir.

Q Can you give me a brief description of that?

THE WITNESS: Go ahead?

THE COURT: Go ahead.

THE WITNESS:

A As I stated, the stay home moms, transportation, a person that's self-employed that cannot be away from their

business. There are seven or eight different ones. And of course there are ones, there are people who are exempt. We have certain ones that are exempt from the wheel.

BY MR. KEARNEY:

Q Some of those reasons – I believe you've been in the courtroom this morning, some of those reasons I know the judge would make a decision on who to excuse. How do you between them?

A If they report in here with an excuse and they don't let us know ahead of time, then that is when he asks the question in voir dire if there's any reason why they cannot be present, then they can stand up and tell it at that time.

Now, I had a sick lady that came in this morning and she had a virus and so I excused her.

THE COURT: All right. We're going to interrupt this now. You may step down and we'll take it up later.

Mr. Marshal, move that podium back there to the end of the jury box, the one over at the end of the jury box. That's where counsel will stand to question the witnesses. This one here not that one, the one over there. Just leave that one. That one doesn't have a mic?

MR. McKISSIC: Your Honor,

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

NO. WM 73-28

1997 AMENDMENT TO PLAN OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, ALL DIVISIONS, FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Pursuant to the Jury Selection and Service Act of 1968, 28 USC 1861 et seq. (1966 & Supp. 1996), as amended, the following amended plan is hereby adopted by this court, subject to approval by a reviewing panel and to such rules and regulations as may be adopted from time to time by the Judicial Conference of the United States.

1. APPLICABILITY OF PLAN

This plan is applicable to the Northern District of Mississippi which is hereby divided for jury selection purposes into three jury divisions. Each county within the District is included in one of the following jury divisions:

Eastern Division: Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo and Winston.

Western Division: Benton, Calhoun, DeSoto, Grenada, Lafayette, Marshall, Montgomery, Panola, Pontotoc, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster and Yalobusha.

Greenville Division: Bolivar, Coahoma, Carroll, Humphreys, Leflore, Sunflower and Washington.

2. POLICY DECLARATIONS

It is hereby declared to be the policy of this court that all grand and petit jurors chosen to serve are to be selected according to uniform, independent federal qualifications. All litigants in this District or any jury division thereof who are entitled to trial by jury have the right to a jury chosen from a venire selected at random from a fair cross-section of the entire community in the district, or applicable jury division. Persons selected for jury service have an obligation to serve.

It is the purpose of the procedures herein set out to select impartial jurors who are fairly chosen in such a manner that each of the political subdivisions in each jury division of this court will be substantially proportionately represented. Jurors are not to be chosen according to the so-called "key man" or "suggester system" and there are to be no so-called "blue ribbon" qualifications to serve as jurors. The qualifications of jurors are to be determined only by competent, objective evidence and prospective jurors are not to be disqualified, exempted, excluded or excused on the basis of subjective evidence.

No citizen shall be excluded from service as a grand or petit juror in this District Court, or any jury division thereof, on account of race, color, religion, sex, national origin, or economic status.

3. MANAGEMENT AND SUPERVISION OF JURY SELECTION PROCESS

The clerk of the court shall manage the jury selection process under the supervision and control of the Chief Judge of this District. The phrase "Chief Judge of this District" whenever used in this plan shall mean the Chief Judge of this District, or in his absence, disability or inability to act, the active District Court Judge who is present in the District and

has been in service the greatest length of time. Wherever the Jury Selection and Service Act requires or authorizes the plan to designate a district court judge to act instead of the Chief Judge, the above definition shall apply and such active District Court Judge above mentioned is hereby designated to act. The word "clerk" wherever used in this plan shall mean the clerk and any or all of his deputies. There shall be no jury commission.

4. RANDOM SELECTION FROM VOTER REGISTRATION LISTS

Voter registration lists represent a fair cross-section of the community in the Northern District of Mississippi. The rights of all citizens are substantially protected by the use of such lists as the source of selection of prospective jurors; therefore, no other source is proposed. Accordingly, names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all of the counties in the relevant jury division. For the ascertainment of the voter registration list current in such counties, the clerk shall rely upon and use the latest, up-to-date official poll books maintained for each election district of such counties as may be in the possession of the County Registrar. Such poll books constitute in this District accurate and comprehensive compiled lists of all persons who are, in fact, duly registered and qualified to vote in such county. The clerk shall supplement such poll books, where necessary, to insure the inclusion of all names of all persons having recently registered to vote up to 30 days prior to the presidential general election in November.

This plan is based on the conclusion and judgment that the policy, purpose and intent of the Jury Selection and Service Act of 1968 as amended will be fully accomplished and implemented by use of voter registration lists reflected by the most current election district poll books as

supplemented by the inclusion of subsequent registrants up to 30 days prior to the presidential general election in November, the latest practicable date as the source of an at random selection of prospective grand and petit jurors who represent a fair cross-section of the community. This determination is supported by all the information this court has been able to obtain after diligent efforts on its part and after full consultation with the Fifth Circuit Jury Working Committee and the Judicial Council of the Fifth Circuit. In counties where manual name selection procedure is necessary, the clerk is authorized to use personnel of the circuit clerk's office to perform the task of counting, selecting and transcribing names according to the selection formula described in this plan.

5. MASTER JURY WHEELS

The clerk shall maintain a separate master jury wheel for each of the three jury divisions within the District.

The clerk shall make the random selection of names taken from the voter registration lists as they appear on poll books for the master jury wheels as follows. There shall be selected for the master jury wheel for each jury division as a minimum approximately this number of names:

Eastern Division	12,000
Western Division	12,000
Greenville Division	12,000

These numbers are as large as they are to allow for the possibility that some juror qualification forms, hereinmentioned, will not be returned, that some prospective jurors may be disqualified by law, that some may be exempted or excused under this plan, and also because of the need for more prospective jurors due to the addition of a third District Judge in this District. The physical form of

record on which names for the master wheels are kept may include labels or such electronic devices as punch cards, magnetic tapes or disc files. If the above numbers are less than one-half of one percent of the total number of registered voters for the jury division, the court concludes that such percentage number of names is unnecessary and cumbersome. The Chief Judge of this District may order additional names to be placed in the master jury wheels from time to time as necessary.

After ascertaining, as hereinabove provided, the total number of registered voters for each jury division, the clerk shall divide that number by the number of names to be selected for the master jury wheel from that jury division. A certain quotient figure will be thereby produced for each jury division. After determining the "quotient", the clerk shall establish a starting number. This number will locate on the voter list(s), or a data computers' tape, disc, or punched card record of such voter lists, the first name to be selected. There shall be drawn from each of the counties forming a particular jury division that percentage of names which the number of registered voters in each county bears to the total registered voters in such jury division. Two examples may be used to demonstrate this procedure. If there are 138,072 registered voters in the Eastern Jury Division, that number is to be divided by 12,000 (the needed number of prospective jurors as above) to produce a quotient figure of 17. The clerk shall then draw by lot from each county in the jury division every 17th name on all the election districts' poll books of said county (or on a data computer tape, disc, or punched card record of such voter lists), such as the 17th, 34th, 51st, 68th, etc. name. The number of names drawn shall be in direct proportion to the number of registered voters in each such county as such number bears to the total number of registered voters in the Eastern Jury Division. If there are in Monroe County 15,600 registered voters, thus

constituting 11% of the registered voters in the Eastern Jury Division, then 11% of the 12,000 names to be drawn by lot for the entire Eastern Jury Division shall be drawn from Monroe County. Again for example, if there are 65,437 registered voters in the Greenville Jury Division, that number will be divided by 12,000 (the needed number of prospective jurors) to produce the quotient of 8. The clerk shall then draw by lot from each county in the Greenville Jury Division every 8th name on all the election districts' poll books of such county (or on a data computer's tape, disc, or punched card record of such voter lists), such as the 8th, 16th, 24th, 32nd, etc. names. The number of names drawn shall be in direct proportion to the total of registered voters in each such county as such number bears to the total number of registered voters in the Greenville Jury Division. If there are in Washington County 23,833 registered voters, constituting 37% of the registered voters in that whole division, then 37% of the 12,000 names to be drawn for the Greenville Jury Division shall be drawn from Washington County. In any case, should the first drawing by use of the quotient number and multiples thereof, as above provided, not produce enough names in a particular county or counties to equal its proportionate share, then the clerk shall make a second drawing by taking a number from 1 to the particular quotient number, same to be selected by lot, and using such number for the second drawing to the extent that it may be needed. For example, if on such second drawing the clerk in the Eastern Jury Division draws by lot the number 10, he shall pick the 10th name and each 17th name thereafter, 10th, 27th, 44th, 61st, etc. In case in the second drawing a particular number should result in a name which has been previously drawn by lot on the first drawing, such name shall be ignored and the name in the next multiple of that particular drawing, as for example 17, shall be selected. After determining the total number of names needed for the

master jury wheel, the clerk may proceed through the use of a properly programmed data computer or through a combination of manual and computer methods to make the initial selection of names from the list of voters in each county.

The master jury wheel shall be emptied and refilled every four years between the date of the November presidential election and the following March 31st.

6. SELECTING THE NAMES BY MACHINE METHOD

This court finds that electronic data processing methods can be advantageously used for selecting and copying names from the voter lists of those larger counties that maintain these lists in machine readable forms such as punch cards, magnetic tapes, or magnetic discs. It is further found that in smaller counties currently maintaining their lists in printed form, it may be advantageous to employ a combination of methods whereby names are initially selected from the voter lists manually and then recorded on punch cards and tapes for subsequent handling and copying of those names by electronic machine methods.

Therefore, a properly programmed electronic data processing system or a combination system employing both manual and electronic methods may, at the clerk's option and after consultation with the Chief Judge, be used to select master wheel names from voter lists of any and all counties in the district, provided that the required proportions of names for each county are maintained and that the above described "quotient" and "starting number" formula is followed.

Similarly, this court has determined that an electronic data processing system or a combination electronic and manual system may, at the option of the clerk and the Chief Judge, be used to select names from the qualified wheel of

persons to be summoned to serve as grand and petit jurors, and for the recording of names of prospective jurors on any papers and records needed by the court to administer the selection, and payment of jurors.

If the court elects to use the electronic machine methods in connection with any or all of the district's voter records, source lists, master jury wheels, or qualified jury wheels the name selection system shall be planned and programmed according to a "starting number" and "quotient" formula. If the court uses a manual system for drawing names from any jury division's master or qualified wheels the names shall be randomly drawn by lot.

7. DRAWING OF NAMES FROM THE MASTER JURY WHEEL: COMPLETION OF JURY QUALIFICATION FORM

From time to time as directed by the Chief Judge of this District, the clerk shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk shall have prepared, by manual or computer means, a list of the names drawn, which list shall not be disclosed to any person except pursuant to §§ 1867 and 1868 of the Act. The clerk shall by manual or computer means, prepare and have mailed to every person whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk by mail within ten days. If the person is unable to fill out the form, another person shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk within ten days. Any person who fails to return a

completed juror qualification form as instructed may be summoned by the clerk forthwith to appear before the clerk to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk may, at the discretion of the Chief Judge, except where such person's prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under §1871 of the Act. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the clerk, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk may be noted on the juror qualification form and transmitted to the Chief Judge of this District.

Any person summoned as above provided who fails to appear as directed shall be ordered by said Chief Judge forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

8. DISQUALIFICATION FROM JURY SERVICE

The court hereby finds in accordance with Section 1865(b) of the Act that no person shall be qualified for jury service if he --

(1) is not a citizen of the United States, eighteen years old, and a resident for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

9. EXEMPTION FROM JURY SERVICE

The court hereby finds and states that it is in the public interest, and not inconsistent with Sections 1861 and 1862 of the Act, to exempt certain groups or occupational classes of persons, as follows:

(1) member in active service of the armed forces of the United States;

(2) members of the Fire or Police Departments of any State, District, Territory, Possession or subdivision thereof;

(3) public officers in the executive, legislative, or judicial branches of the government of the United States, or any State, District, Territory, Possession or subdivision thereof who are actively engaged in the performance of official duties (Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office).

10. EXCUSE FROM JURY SERVICE ON INDIVIDUAL REQUEST

This court hereby finds and states that jury service by members of certain groups or occupational classes of persons would entail undue hardship and extreme inconvenience to the members thereof, and their excuse from jury service, which is not inconsistent with §§ 1861 and 1862 of the Act, shall be granted, upon individual request and if desired, to the following persons:

(1) all full-time ministers of religion engaged in the active discharge of their ministerial duties;

(2) all actively practicing attorneys, physicians, dentists, optometrists, pharmacists, and registered and licensed practical nurses;

(3) all persons over 70 years age at the time of executing the juror qualification form;

(4) all persons who have served as a grand or petit juror in a state or federal court within the past two years;

(5) all persons who were summoned twice for jury duty within the past year and did not serve;

(6) persons whose services are so essential to the operation of business, commercial or agricultural enterprise that it must close or cease to function if they are required to perform jury duty;

(7) volunteer safety personnel or individuals serving a public agency in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew; and

(8) persons having active care and custody of a child or children under 10 years of age whose health and/or safety would be jeopardized by their absence for jury service or a person who is essential to the care of aged or infirmed persons.

Additionally, the court or the clerk of court may, in its discretion, excuse persons summoned for jury service upon a showing of undue hardship, extreme inconvenience, or other grounds of exclusion as set forth in Section 1866 of the Act, for such period of time as the court may deem necessary and proper.

11. DETERMINATION OF QUALIFICATIONS, EXEMPTIONS AND EXCUSES

The Chief Judge of this District, on his initiative or upon the recommendation of the clerk, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service, as provided in this plan. The clerk shall enter such determination in the space provided on the juror qualification form and the numerical list of names drawn from the master jury wheel. If a person does not appear in response to a summons, such fact shall be noted on said list.

12. QUALIFIED JURY WHEEL

The clerk shall also maintain separate qualified jury wheels for each jury division in the District and he shall place in such wheels the names of all persons drawn at random from the master jury wheels and not disqualified, exempt, or excused pursuant to this plan. The clerk shall insure that at all times at least 300 names are contained in each such qualified jury wheel. The qualified jury wheel shall be emptied and refilled pursuant to the procedure herein prescribed every four years between the date of the

November presidential general election and the following June 30th.

13. DRAWING OF JURY PANELS

From time to time the clerk, when ordered by a judge of this court, shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels, and the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel. After such list is prepared, the clerk may disclose the names thereon to attorneys of record for parties having cases set for trial and to other members of the bar who may request same two weeks prior to commencement of jury service; provided, however, a District Judge of this District may at any time or from time to time order generally, or with respect to any particular term or terms of court, that these names be kept confidential in any case when the interests of justice so require.

Should there occur an unanticipated shortage of available petit jurors, a sufficient number of additional jurors shall be publicly drawn at random by the clerk from the qualified jury wheel of the relevant jury division and such persons whose names are so drawn shall be summoned by the Marshal for jury duty as directed by the judge ordering the panel.

The clerk may, at his or her option and after consultation with the Chief Judge, maintain qualified wheels for all Jury Divisions through use of manual methods.

Whenever a qualified wheel is maintained on a data computer, the persons to be summoned for a particular array will be selected by a quotient arrived at by dividing the number of persons needed on the array into the number of names in the qualified wheel. The clerk will draw a starting

number by lot and the computer center will be instructed to follow the starting number and quotient in the machine selection of those persons, and the reporting of their names and addresses on the summons forms.

From time to time the clerk or deputy clerks, or the computer center, as directed by the Order of Court, shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit juries. Notice of the drawing shall be placed on the bulletin board in the lobbies of the federal courthouses at the appropriate jury divisions where the jurors are being summoned. If the court decides to utilize automated data processing equipment in the jury selection process, the public drawing requirement shall apply only to the selection of a starting number and interval ("quotient") which shall govern the selection of juror names from the original source lists. It shall not be deemed to require any public observance of the actual computer operations.

In order to insure the exercise of proper supervision and management over the automated aspects of jury selection and in accordance with statutory requirements, this court shall comply with the following procedures:

(1) The court shall issue to the operator of the computer facilities written instructions describing the operations which shall be performed by the computer equipment. Such instructions for random selection of grand and petit jurors by data processing methods shall be available for inspection by the public.

(2) Upon the completion of the data processing work required of the computer facilities, the court shall require the execution of an affidavit by the agency

providing the computer service. Such affidavit shall state under penalty of perjury that the procedure set down by the court governing the selection of its jurors has been fully met in the automated phase of the selection process.

(3) The clerk shall then receive into the permanent records of the court the selection instructions to the computer facility and the affidavit by the representative of the computer facility certifying compliance with the same.

14. GRAND JURIES

Inasmuch as our grand juries function on a district-wide basis, they shall be drawn by a judge of this court, or the clerk, if so directed by a judge of this court, by drawing a pro rata, or approximately pro rata, number of names at random from the qualified jury wheels of each jury division in the district, and the names so drawn shall be pooled and shall constitute the grand jurors to report for duty.

14A. DISTRICT-WIDE PETIT JURIES

Upon good cause having been shown by either party or on the court's determination *sua sponte* that a petit jury panel should be drawn on a district-wide basis and the court finding that a district-wide jury is preferred due to notoriety of the offenses or parties involved or for other reasons; the court may direct the clerk to draw a petit jury panel on a district-wide basis, instead of a divisional jury panel. If a district-wide jury panel is required, the clerk shall draw a pro rata, or approximately pro rata, number of names at random from the qualified jury wheels of each jury division in the district, and the names so drawn shall be pooled and shall constitute the petit jurors to report for duty.

15. PROCEDURE IN EXCUSING AND ASSIGNING PERSONS TO GRAND AND/OR PETIT JURY PANELS

When only one judge requires the services of a jury panel, and has ordered said panel drawn, that judge shall be responsible for excusing or ruling on requests for excuses of jurors on that panel; provided, that by agreement or in his absence another judge can assume this responsibility.

When more than one judge is utilizing the services of a jury panel, the jury will be organized by the judge who is responsible for the sounding of the docket, and said jury will report to that judge upon completion of each case assigned.

The names of those jurors who have been excused from a panel for hardships or extreme inconvenience reasons will be put back in the qualified jury wheel where they will be subject to subsequent random selection. The grand jury panel will be selected only from names drawn from the qualified jury wheel on order of a district judge. The names of those jurors excused from the grand jury for hardship or extreme inconvenient reasons will be placed back in the qualified jury wheel.

When there is an excess of jurors present (e.g., grand jury) and their presence is required for only one day, the court shall, in its discretion, upon excusing the excess jurors, inform them that their names will be placed back in the qualified jury wheel, subject to subsequent random selection.

16. OTHER PROCEDURES

This plan expressly incorporates herein all other procedures for jury selection and service, not herein specifically provided for, as set forth in Public Law 90-274, entitled "Jury Selection and Service Act of 1968", and this

court reserves all powers, authority, and discretion vested in it by the terms of such Act.

17. DISCLOSURE OF RECORDS

The contents of records or papers used by the clerk in connection with the jury selection process shall not be disclosed to anyone except court personnel at any time without the express consent of the Chief Judge of this District except pursuant to §§ 1867 (a), (b), or (c) and 1868 of the Act.

18. FORMS

Juror qualification forms used in connection with the implementation of this plan and the Jury Selection and Service Act of 1968 shall be those prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States.

SO ORDERED, this ____ day of June, 1997.

United States District Judge

United States District Judge

United States District Judge